

**JUSTIFICATION:
DEFENSE OF NECESSITY AS AN EMERGENCY MEASURE ¹
PENAL LAW 35.05(2)
(Effective Mar. 21, 1968)
Revised Jan. 2018)²**

NOTE: This charge should precede the reading of the elements of the charged crime, and then, the final element of the crime charged should read as follows:

“and, # _____. That the defendant was not justified.”

The defendant has raised the defense of justification [with respect to count(s) (*specify*)]. The defendant, however, is not required to prove that he/she was justified. The People are required to prove beyond a reasonable doubt that the defendant was not justified.

I will now explain our law’s definition of the defense of justification as it applies to this case.

Under our law, conduct which would otherwise constitute an offense is justifiable and not criminal when such conduct is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor.³ That imminent public or private injury must be of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the charged crime(s).⁴

[The necessity and justifiability of such conduct may not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder.⁵]

The People are required to prove beyond a reasonable doubt that the defendant was not justified.

NOTE: At this point, the trial court must select the appropriate alternative set forth below to fulfill the mandate of appellate decisions. See endnote (⁶). Those decisions require that in a case with multiple counts, in which some or all of the counts include the same definition of justification as an element, the trial court's instructions (as well as its verdict sheet) need to convey to the jury that once the jury has determined that the People have failed to prove that the defendant was not justified as to a count, the jury must not reconsider that same justification defense as to any other count and they must find the defendant not guilty of each and every count for which that same definition of justification is an element. (For a sample verdict sheet, see CJI2d Model Verdict Sheet for Justification.)

Select appropriate alternative:

(1) If justification applies to only one count, add the following:

It is thus an element of count [specify number and name of offense] that the defendant was not justified. As a result, if you find that the People have failed to prove beyond a reasonable doubt that the defendant was not justified, then you must find the defendant not guilty of that count.

(2) If justification applies to more than one count submitted to the jury on the verdict sheet, add the following:

It is thus an element of counts [specify numbers and names of the offenses on verdict sheet] that the defendant was not justified. As a result, if you find, as to the first of those counts that you consider pursuant to my instructions, that the People have failed to prove beyond a reasonable doubt that the defendant was not justified, then you must find the defendant not guilty of that count and of the remaining count(s) to which that same definition of justification applies.

(3) If there are additional counts for which justification is not an element, add the following:

If you find the defendant not guilty of counts (specify numbers and names of the offenses for which lack of justification was an element), you still must consider the count(s) (specify name of count) for which the People are not required to prove that the defendant was not justified.

¹ See *People v. Padgett*, 60 N.Y.2d 142 (1983) (the defense of necessity was here applicable to the crime of criminal mischief); *People v. Craig*, 78 N.Y.2d 616 (1991) (the defense of necessity did not here apply to a criminal trespass, arising out of a sit-in at a congressman's office); *People v. Maher*, 79 N.Y.2d 978 (1992) (the defense of necessity here applied to leaving the scene and an ensuing vehicular homicide based on defendant's fear that the driver of the car which was involved in the initial crash was about to produce a weapon); *People v. Rodriguez*, 16 N.Y.3d 341, 345 (2011) (The defense of necessity is also referred to as the "choice of evils" defense. Thus, "[t]o be entitled to such a charge there must be two 'evils.' And here, even under defendant's scenario, there was no "evil" on his part. According to defendant, he was not committing any offense when he jumped into a runaway vehicle to prevent it doing harm to others. So, as to the most serious charges [manslaughter and assault of pedestrians], a justification charge was clearly unwarranted." However, "[i]f defendant elected to operate a motor vehicle, here the truck, while under the influence of alcohol, in an attempt to prevent injury, he faced the choice of two evils: drive while intoxicated or risk a runaway truck causing injury. Therefore, Supreme Court should have granted defendant's request for a justification charge with respect to the operating a motor vehicle while intoxicated counts.").

² The January, 2018 revision provided more detailed instructions at the end of the charge on how to instruct the jury to consider counts with the lack of justification as an element. See text associate with endnote 6.

³ At this point the statute continues "and which is of such gravity that..." For better comprehension, the revision divides the two parts of the sentence into two separate sentences for better comprehension.

⁴ The charge follows the statutory language but here substitutes "charged crime(s)" for the statutory language "offense in issue."

⁵ Penal Law § 35.02(2). The statute also includes some explanation of its legal applicability that is omitted from the wording of the recommended jury instruction. Specifically, the statute begins, "Unless otherwise limited by the ensuing provisions of this article defining justifiable use of physical force..." Thus, before deciding whether to explain justification under this

theory, the court should determine the relevance of the referenced article 35 provisions regarding the use of physical force. Also, the statute ends, "Whenever evidence relating to the defense of justification under this subdivision is offered by the defendant, the court shall rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a defense."

⁶ See (1) *Appellate Division, First Department: People v. Blackwood*, 147 A.D.3d 462 (2017) ("the court's charge did not convey to the jury that an acquittal on the top count. . . based on a finding of justification would preclude consideration of the other charges" for which the lack of justification was an element); *People v Roberts*, 280 AD2d 415, 416 (2001) ("Although the court instructed the jurors that justification was a defense to all of the counts, it did not instruct them that if they were to find defendant not guilty by reason of justification on a count, they were not to consider any lesser crimes").

(2) *Appellate Division, Second Department: People v Feuer*, 11 AD3d 633, 634 (2004) ("[T]he error committed by the trial court in failing to instruct the jurors that if they found the defendant not guilty of a greater charge on the basis of justification, they were not to consider any lesser counts, is of such nature and degree so as to constitute reversible error"); ; *People v Bracetty*, 216 AD2d 479, 480 (1995) ("The court failed to instruct the jury...that the jurors were only to consider the lesser offense if they found the defendant not guilty of the greater offense for a reason other than justification").

(3) *Appellate Division, Third Department: People v Higgins*, 188 AD2d 839, 840-841 (1992) (The trial court properly informed the jury that "only if defendant was found not guilty of the greater offense for a reason other than justification, was the jury to consider the lesser offense").